No. 96-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

As a result of a state court proceeding, General Motors (the defendant below) obtained a consent decree enjoining one Elwell from testifying against GM in products liability cases. In a federal court suit brought by petitioners against GM, the court below held that the Full Faith and Credit obligation precluded petitioners from obtaining Elwell's testimony.

The question presented is whether the court below erred in holding that petitioners, who were not parties to the state proceeding or in privity with any party, could be precluded from obtaining the witness's testimony on the basis of an obligation to give Full Faith and Credit to state court judgments.

PARTIES TO THE PROCEEDING

The petitioners in this case are Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas.

The respondent is General Motors Corporation.

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BRIEF FOR PETITIONERS

Petitioners Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas, seek reversal of the judgment of the United States Court of Appeals for the Eighth Circuit insofar as that court held that the Full Faith and Credit obligation required the trial court to exclude the testimony of Mr. Ronald Elwell.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing (Pet. App. 1a)[1] is reported at 1996 U.S. App. LEXIS 18387. The decision of the Court of Appeals on the merits (Pet. App. 2a-16a) is reported at 86 F.3d 811. The decision of the District Court addressing the Full Faith and Credit issue (Pet. App. 17a-39a) is unreported.

JURISDICTION

On July 25, 1996, the Court of Appeals denied the suggestion for rehearing en banc and the petition for rehearing by the panel. *See* Eighth Cir. Rule 35A(4). The petition for writ of certiorari was filed on October 22, 1996 and granted on March 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in every State to the public Acts, Records, and judicial Proceedings of every

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[1] References to the Appendix to the Petition for Writ of Certiorari are styled "Pet. App. _a." References to the trial transcript are styled "Tr. _."

> other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings may be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1. The Full Faith and Credit statute provides in relevant part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

1. Background. This case began as a products liability action by two children whose mother, 29-year-old Beverly Garner, burned to death in an allegedly defective vehicle manufactured by respondent General Motors Corporation (GM).

On Feb. 23, 1990, Ms. Garner was a front-seat passenger in a 1985 Chevrolet S-10 Blazer when it was involved in an auto accident and caught fire. Although rescuers used three fire extinguishers underneath the hood of the Blazer, the flames kept reappearing. Tr. 558-59. Witnesses heard Ms. Garner screaming repeatedly, "It's hot in here. Please get me out!," Tr. 441-42; "Help me!," Tr. 491, 504-05, 509; and "I don't want to die this way. Please, somebody, help me out!" Tr. 472.

Ms. Garner's children, petitioners here, alleged that the Blazer was defective in that its electric fuel pump continued to pump gasoline to the engine after impact. Specifically, petitioners alleged that the fuel pump relay, designed to shut off the fuel pump when the oil pressure went to zero, was defective because it was placed in a location that made it vulnerable to

collisions. In the 1985 Blazer, the fuel pump relay was attached to the firewall and directly behind the engine block; it was in the "crush zone." Addendum to Appellees' Br. in Ct. App. at 1 (July 20, 1995). (In the 1986 Blazer model, the location of the fuel pump relay was changed to the fender well, outside the "crush zone." Appellees' Addendum in Ct. App. at 2.) Petitioners alleged that the fuel pump relay on the Blazer was damaged in the collision and allowed the fuel pump to continue pumping gasoline into the fire that killed Ms. Garner. In addition, petitioners separately alleged that the 1985 Blazer should have been equipped with an "inertia switch" to shut off the fuel pump, as GM had proposed in a 1973 patent application.

2. Initial Proceedings in the District Court. Petitioners, who are residents of the State of Missouri, filed a wrongful death products liability action in Missouri Circuit Court on Sept. 27, 1991. On Nov. 11, 1991, GM, which is a Delaware corporation with its principal place of business in Michigan, removed the case, pursuant to 28 U.S.C. § 1441, to the United States District Court for the Western District of Missouri. The district court had jurisdiction under 28 U.S.C. § 1332.

During pretrial proceedings, the district court found that "General Motors' discovery practices as a whole [have been] conducted with a complete disregard for both the letter and the spirit of the federal Rules of Civil Procedure." *Baker v. General Motors Corp.*, 159 F.R.D. 519, 520 (W.D. Mo. 1994). Accordingly, "[a]fter full hearings and considerable briefing," *id.*, the district court imposed sanctions against GM. The court ordered that it "shall be established for the purposes of this action" that

> The 1985 Chevrolet S-10 Blazer at issue in this case was defective in that General Motors placed an electric fuel pump in the fuel tank without an adequate mechanism to shut off the pump in the event of a malfunction or collision and that General Motors has been aware of this

> defect and hazard for many years. The fuel pump in the 1985 Chevrolet S-10 Blazer in this case continued to operate after the engine stopped upon impact.

159 F.R.D. at 528. The district court incorporated this language in its jury instruction. The case proceeded to trial on the issue of whether the defect in the 1985 Chevy Blazer "directly caused or directly contributed to cause" the death of Beverly Garner. Tr. 1725.

3. The Elwell Testimony. At trial, the district court permitted petitioners to introduce the testimony of Ronald Elwell, who was a GM employee for nearly 30 years beginning in 1959. Pet. App. 18a. For roughly the first 10 years of his employment with GM, Elwell's primary duties involved the development of door latches and latching mechanisms. Tr. 379. In 1969, Elwell assumed responsibility for a Reliability Program that coordinated quality inspection for products shipped to GM plants. *Id.*

In 1971, Elwell was assigned to the Engineering Analysis Group, which was responsible for providing engineering services to GM's different divisions. Elwell's work centered on fuel systems and fuel-fed fires. Pet. App. 18a. As a member of the engineering group, Elwell assessed the performance of GM vehicles in order to advise engineers who were responsible for developing and designing future vehicles. *Id.* He suggested changes in GM fuel line designs. *Id.* He conducted research and studied accidents in the field involving fires. Elwell also reviewed GM literature on vehicle performance prior to its publication, analyzed relevant legislation that had an impact on the vehicles on which he was working, and advised the advertising department on how GM products should be marketed. *Id.*

In addition, Elwell worked with both GM legal staff and outside counsel in preparing defenses to product liability suits. He testified as an expert witness, consulted with engineers on

liability issues, prepared demonstrative evidence, participated in litigation strategy planning, and helped to answer discovery requests. Pet. App. 18a. Pursuant to Fed. R. Civ. P. 30(b)(6), GM repeatedly designated Elwell as the GM employee most knowledgeable about fuel systems. Pet. App. 18a. None of this litigation-related work, however, was specifically done in connection with the instant case. *Id.*

Elwell's relationship with GM ultimately deteriorated. Elwell contended that GM had withheld vital information from him, making his prior trial testimony on GM's behalf inaccurate. GM contended that Elwell had had disagreements with his supervisors and was disgruntled over his retirement and severance package.

In 1991, Elwell retained his own attorney and testified against GM in a pending products liability case. *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga.).[2] Elwell also filed suit against GM in the Circuit Court of Wayne County, Michigan, alleging wrongful discharge and other tort and contract claims. GM filed a counterclaim against Elwell alleging breach of fiduciary duty for his disclosure of privileged and confidential information and his misappropriation of documents. GM sought a preliminary injunction and, after a brief hearing, the court enjoined Elwell from:

> consulting or discussing with or disclosing to any person any of General Motors Corporation's *trade secrets, confidential information or matters of attorney-client*

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[2] As the district court noted, Elwell's testimony in the *Moseley* case illustrates that "it is possible for Elwell to testify without impermissibly divulging privileged information even as defined by G.M." Pet. App. 33a. Although GM's counsel stated on the record in the *Moseley* case that she would object to any questions invading GM's attorney-client or work-product privileges, Elwell testified for two days (370 transcript pages) before GM's counsel made her first attorney-client or work-product objection. GM made only three such objections in the approximately 580 pages of testimony taken.

> *work product* relating in any manner to the subject matter of any products liability litigation whether already filed or filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employment with General Motors Corporation.

Pet. App. 19a-20a (emphasis added).

Subsequently, GM and Elwell entered into a settlement under which Elwell received an undisclosed sum of money. As part of the settlement, an "agreed" or "stipulated" permanent injunction was entered in the Wayne County Circuit Court without a hearing. The stipulated injunction was considerably broader than the preliminary injunction and prohibited Elwell from:

> (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment General Motors Corporation; and
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> (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial as an expert witness, or a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of the Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

Pet. App. 20a-21a. The settlement agreement also provided that if Elwell were ordered to testify by a court or other tribunal, he could do so without violating the settlement agreement. Pet. App. 5a.

In the case at bar, GM sought to exclude Elwell's testimony on the ground that the Michigan injunction was entitled to Full Faith and Credit in the federal court in Missouri. Pet. App. 18a. After *in camera* review of the Michigan injunction and the settlement agreement, the district court issued an order dated June 18, 1993, allowing the plaintiffs to depose Elwell and to call him as a witness at trial.

The district court explained that Elwell's testimony would be highly relevant:

> The parties agree that Elwell is an expert on G.M. fuel systems, including the design history, fuel system safety, design decision-making and subsequent alternative designs. These are the areas into which plaintiffs wish to inquire.

Pet. App. 22a. The court noted that petitioners had committed not to seek any information that might be subject to the attorney-client privilege or attorney work product privilege, or that otherwise might be confidential. *Id.* The court explained that "the overbroad injunction has prevented the disclosure of not only privileged information, but much discoverable information as well." *Id.* at 27a-28a.

The district court held that the Michigan injunction impermissibly attempted to resolve the rights of nonparties:

> Unlike a traditional injunction situation, this injunction established not only the rights of the parties before the Michigan Court where the case in which it was entered was pending (i.e. Elwell, G.M. and engineer Bill Cichowski), but, if defendant were to prevail here, forever defined the rights of innocent third parties who have a keen interest in the information which Elwell holds.

Id. at 28a. The court noted that "Elwell's cooperation with the

injunction was bought for an undisclosed sum of money as one of the terms of the settlement of his claims against G.M." *Id.* at 26a. The court also explained its "perception" that "G.M. bought Elwell's silence on any matters that could be damaging to G.M.'s interest." *Id.* "G.M. has not only prevented Elwell from speaking on his own behalf, but no one else may find out what he knows, effectively blockading a litigant's search for the truth and for redress." *Id.*

Elwell's trial testimony concerned his research on fuel-fed engine fires. Elwell testified in support of petitioners' claim that the alleged defect in the fuel pump system contributed to the post-collision fire. Tr. 384-89, 391-97. He also testified regarding a 1973 memorandum known as the "Ivey" document. Tr. 407-15; Plaintiffs' Exhibit 621; Pet. App. 6a. The Ivey document is a value analysis prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM and Oldsmobile officials. The Oldsmobile officials were at that time responsible for the overall fuel system design of GM vehicles. Pet. App. 6a.

The Ivey document analyzed the potential expense of the loss of human life per vehicle due to fuel-fed engine fires. The memorandum stated that "[e]ach fatality has a value of $200,000." Tr. 415. It concluded that the cost to society of deaths and injuries from such fires was only about $2.40 per vehicle. Tr. 415-16; Pet. App. 6a. According to Elwell, the memorandum addressed

> what we were able to spend in our opinion to eliminate those fires . . . . [T]he Value Analysis says all we have got is $2.[40] to play with, if you will. We can either put that money in a fuel tank, put that money in a fuel pump, put that money in a fuel line, but in our opinion in order to save these people from dying we can put only $2.[40] into the new cars.

Tr. 418-19.

At no point in Mr. Elwell's testimony did GM object to any question or answer on the grounds of attorney-client, attorney-work-product, or trade secrets privilege.

Following trial, the jury awarded Ms. Garner's children $11.3 million in damages.

4. The Court of Appeals' Decision. On June 14, 1996, the Court of Appeals reversed the district court's judgment and ordered a new trial. As to the discovery sanction, the Court of Appeals agreed that GM had failed to comply with the district court's orders regarding discovery. Pet. App. 8a-9a & n.6. The Court of Appeals further agreed with the district court that GM's failure was "willful" and that the plaintiffs suffered prejudice. *Id.* "GM's conduct, therefore, clearly justified the imposition of Rule 37 sanctions." *Id.* at 9a. Nonetheless, the Court of Appeals held that the district court's sanction "was simply too severe for the facts presented and should have been drawn more narrowly." *Id.* at 10a. In particular, the court noted that "'there is a strong policy favoring a trial on the merits and against depriving a party of his day in court.'" *Id.* at 9a (citation omitted). "[T]he opportunity to be heard is a litigant's 'most precious right and should be sparingly denied.'" *Id.* (citation omitted).[3]

On the Full Faith and Credit issue, however, the Court of Appeals disregarded its own teaching concerning the importance of the right to be heard. The court agreed with GM that the Michigan injunction prevented the district court from admitting Mr. Elwell's testimony. Pet. App. 13a-16a. Even though petitioners were unrepresented nonparties in the Michigan proceeding, the Court of Appeals held that they could be bound by it:

> [T]he district court emphasized the importance of other

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[3] The ruling of the Court of Appeals with respect to the sanctions issue is not before this Court.

> interests, such as the discovery rights of litigants, of which it believed the Michigan court was unaware when it entered the injunction. We find no evidence in the record to support such a statement. A stipulation in which GM expressly approved of Elwell's testimony in another case then pending was executed concurrently with the injunction. The Michigan court was, therefore, aware of the existence of at least some other parties' interests. The district court also would have assumed, as did the parties, that other similar litigation would follow; the injunction would otherwise have been unnecessary. Consequently, we find that the appellees failed to establish that the Michigan injunction was not entitled to full faith and credit.

Id. at 15a-16a (citation and footnote omitted).[4]

On June 26, 1996, petitioners filed a timely Petition for Rehearing En Banc, which under Eighth Circuit Rule 35A(4) functioned both as a petition for rehearing and a suggestion for rehearing en banc, and which was treated by the Eighth Circuit as such. Pet. App. 1a. On July 26, 1996, the Eighth Circuit denied the rehearing petition without comment.

On March 24, 1997, this Court granted the petition for writ of certiorari.

SUMMARY OF ARGUMENT

GM attempted to prevent third parties, including petitioners, from obtaining the testimony of its former employee, Mr. Elwell, by entering into a stipulated consent judgment in Michigan state court as part of a settlement with Elwell. The Michigan injunction purported to bar Elwell from testifying even as to non-

[4] The Court of Appeals also held that the jury instructions for "aggravating damages" were inadequate. Pet. App.10a-13a. The correctness of this holding is not before this Court.

privileged, non-trade-secret information.

I. The Eighth Circuit erred in holding that the Full Faith and Credit obligation precludes petitioners from obtaining Mr. Elwell's testimony in a federal court in Missouri. That holding is flatly inconsistent both with basic principles of due process and with the Full Faith and Credit obligation set out in 28 U.S.C. § 1738. Third parties cannot be bound as a matter of Full Faith and Credit to judgments in prior proceedings in which they did not participate and in which they were not represented. This Court has held that "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). Hence, it is not surprising that the Eighth Circuit's judgment stands in square conflict with the decisions of at least 33 lower courts that have permitted Elwell to testify despite the Michigan injunction. *See* Addendum hereto.

The fact that Elwell was present in the Michigan proceeding is irrelevant, for GM is attempting to use the Full Faith and Credit obligation to deny *petitioners* the right to pursue a lawful claim by eliciting relevant evidence.

II. Even if the Full Faith and Credit obligation were somehow triggered here — despite the Due Process Clause — the Michigan injunction should not be given preclusive effect because of the overriding interest of a separate judicial system — in this instance the federal courts established under Article III — in obtaining "every man's evidence." The absence of a Full Faith and Credit obligation is confirmed in this case by the principle of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), which prohibits state courts from enjoining federal judicial proceedings.

If permitted to stand, the Eighth Circuit's ruling would provide wrongdoers with a blueprint for purchasing the silence of potentially vital witnesses — and for defeating the judicial

processes of other jurisdictions. The Court of Appeals' decision would tell wrongdoers that they need only enter into consent decrees with potential witnesses in which those witnesses promise, in exchange for money supplied in accompanying settlement agreements, never to testify in court. Contrary to the Eighth Circuit's reasoning, such an assault upon the integrity of state and federal judicial systems outside Michigan finds no support in the Full Faith and Credit principle.

ARGUMENT

I. THE FULL FAITH AND CREDIT CLAUSE IS INAPPLICABLE BECAUSE DUE PROCESS FORBIDS BINDING ABSENT PARTIES TO A JUDGMENT

1. The Full Faith and Credit statute, 28 U.S.C. § 1738, "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996). The Full Faith and Credit statute, however, does not — indeed, could not — override the basic precept of due process that "a judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

This Court has observed that the "limits on a state court's power to reflect estoppel rules" are a reflection of a "general consensus 'in Anglo-American jurisprudence'" that a person "'is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765-66 (1996) (quoting *Wilks*, 490 U.S. at 761-62, and *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 1766 (citation omitted); *see also Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986) ("parties

who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement . . . And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.").

Thus, in such decisions as *Richards v. Jefferson County* and *Hansberry v. Lee*, this Court recognized that due process prohibited binding nonparties to a prior judgment, even when the subsequent litigation occurred in the same state as the prior judgment. The Full Faith and Credit obligation has always been understood to be "subject to the requirements of . . . the Due Process Clause." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). A party deprived of a "full and fair opportunity to litigate the claim or issue" cannot be bound under either 28 U.S.C. § 1738 or the Full Faith and Credit Clause because the party would not and could not be bound by the judgment even in the state in which it was rendered. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982) (internal quotation omitted). "In such a case, there could be no constitutionally recognizable preclusion at all." *Id.* at 482-83.

Accordingly, it is well settled that "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process . . . is not entitled to full faith and credit elsewhere"); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (opinion of the Court by Frankfurter, J.) (denying Full Faith and Credit because "those not parties to a litigation ought not to be foreclosed by the interested actions of others"); Restatement (Second) of Conflict of Laws § 104 (1969)

("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.").

Recognition of this basic principle reaches back at least as far as *Pennoyer v. Neff*, 95 U.S. 714, 727, 732 (1878), where this Court held that an Oregon state-court judgment against a California resident was void for lack of personal jurisdiction. *See also Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990) (plurality opinion) ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, *see Bowser v. Collins*, Y.B.Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng. Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Coke Rep. 68b, 77a, 77 Eng. Rep. 1027, 1041 (K.B. 1612). . . . American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted.").

In *Fall v. Eastin*, 215 U.S. 1 (1909), this Court held that Full Faith and Credit did not require Nebraska to bind a purchaser of land to the assignment of property rights contained in a divorce decree entered in Washington, because the Washington decree "gave no such equities as could be recognized" against third parties. *Id.* at 14. *See also Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957) (judgment void and not entitled to Full Faith and Credit where issuing court lacked personal jurisdiction over defendant); *Riley v. New York Trust Co.*, 315 U.S. 343, 356 (1942) (Stone, C.J., concurring) ("A judgment so obtained is not entitled to full faith and credit with respect to those not parties."); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe . . . .").

2. The Eighth Circuit's decision flies in the face of this

fundamental principle. It bars petitioners — who are concededly complete strangers to the Michigan proceeding that resulted in the Elwell injunction — from introducing his testimony in a wholly separate proceeding in which they seek to pursue their own legal right to recover for death caused by a defective product. Not surprisingly, the Eighth Circuit's judgment directly conflicts with the decisions of some 33 lower courts that have recognized a plaintiffs' right to have Elwell testify despite the injunction. Seven appellate tribunals and 26 trial courts have permitted Elwell to testify as to non-privileged and non-trade-secret matters. *See* Addendum hereto. For example, the California court of appeal explained, in the course of holding the Michigan injunction unenforceable in California, that:

> The Michigan injunction adversely affected petitioners' causes of action against GM by effectively destroying their ability to prove a substantial portion of their case. . . . Neither the petitioners nor their causes of action were subject to the jurisdiction of the Michigan court.

Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 25 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996). The Washington Court of Appeals similarly observed that, with respect to the Full Faith and Credit obligation, "[a] judgment cannot affect a stranger to the original lawsuit without violating procedural due process." *Worden v. General Motors Corp.*, Case No. 18127-4-II, slip op. 4 (Wash. App. May 20, 1994).

Since the issuance of the decision below, at least four federal district courts have declined to follow it. *See, e.g., Hart v. General Motors Corp.*, C.A. No. 96-CV-1862-CC, slip op. 3 (N.D.Ga. Feb. 11, 1997) (citing but rejecting Eighth Circuit decision); *Ake v. General Motors Corp.*, 942 F. Supp. 869, 881 (W.D.N.Y. 1996) (specifically "declin[ing] to adopt [the Eighth Circuit's] approach"); *Head v. General Motors Corp.*, CA No. 6:95-3613-20, slip op. 2-3 (D.S.C. July 17, 1996) ("the Michigan injunction is not entitled to full faith and credit because Head

was neither a party to nor in privity with a party to the prior proceeding in Michigan"); *Kibler v. General Motors Corp.*, No. C94-1494R (W.D. Wash. July 10, 1996) (denying defendant's motion to prevent Elwell from testifying as expert witness). Indeed, just prior to the submission of this brief, Mr. Elwell was permitted to testify in a California state proceeding.[5] The Eighth Circuit's decision is thus directly at odds with the overwhelming majority of lower courts on the issue.[6]

3. Nor is it relevant that Elwell participated in the prior Michigan proceeding. For GM is invoking the Full Faith and Credit obligation directly against *petitioners* and other *nonparties* to the Michigan proceeding, in an attempt to deny two interrelated legal and property rights held by those nonparties: the right to pursue a lawful claim of liability,[7] and the right to do so by eliciting relevant, nonprivileged evidence.

Petitioners have separately cognizable interests — indeed, legal rights — that are distinct from Elwell's. Directly apposite here is this Court's decision in *Ex Parte Uppercu*, 239 U.S. 435 (1915) (Holmes, J.). There, the party seeking discovery had not participated in a prior case, in which a court had purported to seal all documents and thereby make them unavailable for

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[5] *See Stephens v. General Motors Corp.*, No. 303305 (Stanislaus County Super. Ct., Calif.)

[6] In a few questionable decisions, some trial courts have held that Elwell could not testify. Pet. App. 35a; *see also Pharo v. General Motors Corp.*, No. 94-5104 (E.D.Pa. Mar. 10, 1997). These decisions were rendered in readily distinguishable circumstances, as in instances where Elwell had previously assisted GM's attorneys in preparing for the very *same* trial in which the plaintiff had sought to call him as a witness. Pet. App. 35a. In *Harris v. General Motors Corp.*, No. 111342 (Super. Ct. Ventura Cty., Calif.), for example, Elwell had been named, pretrial, as an expert witness *by GM*.

[7] It is, of course, settled that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

evidence in other proceedings. In reversing a lower court's order denying petitioner leave to inspect the documents, this Court opined:

> The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it . . . . Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it, however proper and effective the sealing may have been against the public at large . . . . As against the petitioner the order has no judicial character, but is simply an unauthorized exclusion of him by virtue of *de facto* power.

Id. at 440-41. A California court of appeals properly explained that "[t]he principle expressed in *Ex Parte Uppercu* is directly applicable here," because the Michigan decree cannot prevent third parties from obtaining Elwell's testimony. *Smith v. Superior Court*, 49 Cal. Rptr. 2d at 27. "The Michigan court had no jurisdiction over the petitioners, who had neither notice of nor opportunity to contest the issuance of the injunction, a decree obtained as a result of a purchased settlement in a completely unrelated case." *Id.*

> Enforcement of the injunction would substantially impair the right of petitioners and others similarly situated to full acquisition of evidence necessary to prosecute their claims against GM without any possible legal redress. Just as in *Uppercu*, enforcement of the injunction against unrelated third parties who are not even remotely connected with the employment dispute between Elwell and GM would constitute acquiescence to an unauthorized exercise of de facto power. Bedrock

constitutional principles mandating procedural fairness preclude such a result.

Id.

II. EVEN IF THE FULL FAITH AND CREDIT OBLIGATION WERE TRIGGERED, IT WOULD YIELD HERE TO OTHER, OVERRIDING PRINCIPLES

Petitioners' primary position is that the Full Faith and Credit obligation is simply inapplicable here because due process prohibits binding third parties to judgments when they were unrepresented in the prior proceedings. But, even if the Full Faith and Credit obligation were somehow triggered here, it would have to yield to overriding principles of law: to institutional and systemic interests in the integrity of judicial proceedings.[8]

1. It is an "ancient proposition of law" that "the public . . . has a right to every man's evidence." *United States v. Nixon*, 418 U.S. 693, 709 (1974) (internal quotation omitted); *see also Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996) (the "right to every man's evidence" is a "fundamental maxim" recognized "[f]or more than three centuries") (internal quotation omitted); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (maxim is a

[8] The instant case does not involve the broad and unresolved questions of the extent to which the substantive policy underlying the law of one jurisdiction must yield to the substantive policy of another. *Compare, e.g., Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Hughes v. Fetter*, 341 U.S. 609, 611-12 (1951); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939), *with Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); *Fauntleroy v. Lum*, 210 U.S. 230, 236-38 (1908). Rather, Part II of this brief addresses the narrower, but critical, issue of a jurisdiction's interest in the integrity of its judicial proceedings — in this case of *federal* judicial proceedings.

"fundamental principle" of law); *United States v. Mandujano*, 425 U.S. 564, 572 (1976) ("long accepted in America as a hornbook proposition"); *United States v. Burr*, 25 Fed. Cas. 38, 39 (No. 14,692e) (CC Va. 1807) (Marshall, Circuit Justice) ("[E]very person is compellable to bear testimony in a court of justice.").

As early as 1562, persons having relevant knowledge were compelled by law in England to give evidence in court,[9] and in 1612 Lord Bacon observed that all subjects owed the King "their knowledge and discovery." *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (citing *Countess of Shrewsbury's Case*, 2 How. St.Tr. 769, 778 (1612)). Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the right to every man's evidence during the 1742 debate over the Bill to Indemnify Evidence, which would have granted immunity to witnesses against Sir Robert Walpole, first Earl of Oxford. *Jaffee*, 116 S. Ct. at 1928 n.8.

Thus, what GM purported to purchase from Elwell — his silence even as to non-privileged matters — was not Elwell's to sell. Just as judicial precedents "are not merely the property of private litigants," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994) (internal quotation omitted), so too non-privileged knowledge may not simply be bargained away. Rather, such information is subject to a public right of access in judicial proceedings.

2. The right to every man's evidence is particularly salient here. Former employees serving as whistleblowers have routinely provided important information regarding matters of public health, safety, and other matters of intense public concern. Indeed, during the past two decades, Congress has included whistleblower protection provisions in at least 27 federal statutes which explicitly prohibit retaliation against public and private

[9] *See* Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562).

sector employees who report violations of environmental, civil rights, and public health laws.[10] Federal employees are protected by express whistleblower safeguards in the Civil Service Reform Act (CSRA), 5 U.S.C. § 2302, as amended by the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, (codified throughout 5 U.S.C.). Some 35 States have adopted whistleblower protection statutes as well. *See* Note, 38 S.D. L. REV. 316 (1993).

The instant case illustrates the importance of the information at stake. Mr. Elwell has drawn public attention to the fire risks of certain models of GM trucks and has testified that GM knew about safety problems with fuel tanks mounted on the trucks' sides.[11] The U.S. Department of Transportation subpoenaed

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[10] Each of the following statutes contains antiretaliation provisions: Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621; Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641; Asbestos School Hazard Detection Act of 1980, 20 U.S.C. § 3601; Clean Air Act, 42 U.S.C. § 7401; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601; Department of Defense Authorization Act of 1984, 10 U.S.C. § 1587; Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409; Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001; Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5801; Equal Employment Opportunity Act (Title VII), 42 U.S.C. § 2000e; Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3); Federal Employers' Liability Act (FELA), 45 U.S.C. § 51; Federal Mine Safety and Health Act (FMSHA), 30 U.S.C. § 801; Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251; Hazardous Substances Release Act, 42 U.S.C. § 9601; International Safe Containers Act, 46 U.S.C. § 1501; Jurors' Employment Protection Act, 28 U.S.C. § 1861; Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901; Migrant Seasonal and Agricultural Worker Protection Act, 29 U.S.C. § 1801; Occupational Safety & Health Act, 29 U.S.C. § 651; Public Health Service Act, 42 U.S.C. § 201; Railroad Safety Authorization Act of 1978, 45 U.S.C. § 421; Safe Drinking Water Act, 42 U.S.C. § 300f; Solid Waste Disposal Act, 42 U.S.C. § 6901; Surface Mining Control & Reclamation Act, 30 U.S.C. § 1201; Surface Transportation Assistance Act of 1978, 49 U.S.C. § 2301; Toxic Substances Control Act, 15 U.S.C. § 2601.

[11] At a 1993 trial that was expressly exempted from the Michigan injunction,

Elwell during its investigation into the estimated 6 million 1973-87 GM pickup trucks with the side-mounted design. The U.S. Court of Appeals pointed to the "potentially damaging testimony" by Elwell regarding fuel tank design in invalidating a class action settlement. *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 811 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).[12] Nor is Elwell alone. For example, former Chrysler product planning manager Paul Sheridan was terminated and ultimately sued for $82 million by the automaker after raising safety concerns regarding the rear latch on certain models of Chrysler minivans in which at least than 35 people died.[13]

Elwell testified that:

• in numerous prior lawsuits, GM had failed to disclose crash tests showing that in some collisions side-mounted fuel tanks were "badly smashed" and "split open" with holes "as big as melons," Trial Transcript, *Moseley v. General Motors Corp.*, No. 90-V-6276, at 128 (Jan. 14, 1993);

• those tests revealed that the side-mounted design "was not defensible" and "was defective," yet GM continued to use it, *id.* at 136;

• the crash program "was a major, major undertaking, a major project that would have [a] very high level of management approval . . . . [S]omebody was in a big panic." *Id.* at 137-38.

[12] The Third Circuit explained:

> In his deposition, Elwell testified that GM designed a retrofit using a steel cage which prevented the gas tanks from rupturing in side impact testing. He further testified that GM abandoned the retrofit (knowing, because of its own secret crash tests, of the increased fire danger) only because GM feared that it would give the public the wrong impression.

55 F.3d at 811.

[13] *See Chrysler Corp. v. Sheridan*, No, 94-489177-CZ (Cir. Ct. of Oakland Cty., Mich. Mar. 27, 1996) (enjoining Sheridan from disclosing proprietary or confidential information, although exempting disclosures to the NHTSA and trial testimony). According to Sheridan, the latch was vulnerable to failure in minor collisions, and occupants were sometimes ejected when the

The issue is not limited to the auto industry, nor is it limited to civil litigation between private parties. For example, Brown & Williamson Tobacco Corporation procured a Kentucky state-court injunction against Jeffrey Wigand, former vice-president for research and development at Brown & Williamson, in an attempt to prevent him from being called to testify by the Mississippi Attorney General in a civil case in a Mississippi court.[14] Four tobacco companies have also sought injunctions from a North Carolina court to prevent former Liggett Group executives from testifying in tobacco cases brought by state attorneys general.[15]

In *EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996), the court of appeals invalidated a provision of an employment discrimination settlement in which the plaintiff agreed not to cooperate with the EEOC's sexual harassment investigation involving other employees. The court explained that, "if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered." *Id.* at 744. The court added that the right to provide truthful information to the EEOC "is not a right that an employer can purchase from an employee, nor is it a right that an employee can sell to her employer." *Id.* at 744 n.5; *see also Hamad v. Graphic*

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latch opened. NHTSA officials blamed the latch for some 35 deaths, and Chrysler ultimately promised to replace the latches for free. *See Minivan Liftgates Opened in Transit, Court Told*, DETROIT FREE PRESS, July 12, 1996, at 7E.

[14] *See* Alix M. Freedman, *The Deposition: Cigarette Defector Says CEO Lied to Congress About View of Nicotine*, WALL ST. J., Jan. 26, 1996, at A1; Robb Mandelbaum, *Whistle-Blowers; Brown & Williamson v. Wigant*, AM. LAW., Mar. 1996, at 115; Myron Levin, *Smoking Gun: The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES, June 23, 1996, at D1.

[15] *See* Lyle Denniston, *High Court to Rule on Bid by GM to Block Testimony*, BALTIMORE SUN, Mar. 25, 1997, at 1C.

Arts Center, Inc., 72 Fair Empl. Prac. Cases (BNA) 1759 (D. Or. Jan. 3, 1997) (refusing to enforce a secrecy provision in a settlement agreement between a company and a former employee when the latter was called to testify in a racial discrimination case).

All of these examples illustrate the danger of the Eighth Circuit's aberrant view that wrongdoers may purchase the silence of whistleblowers — and of other potential witnesses even if they are not former employees. Under the Eighth Circuit's approach, courts of other jurisdictions would be powerless to permit, much less to compel, the introduction of probative, non-privileged evidence that was subject to a state or local injunction. Such a result would provide potential wrongdoers with a blueprint for defeating civil, administrative, or even criminal prosecution.

In particular in a case such as this, denying state and federal courts relevant and nonprivileged evidence would plainly intrude on the institutional integrity of the respective judicial systems themselves. Judicial proceedings could become instruments of injustice rather than searches for truth.

Numerous lower courts have recognized precisely this point in permitting Mr. Elwell to testify. A California court of appeal explained that the injunction "would undermine the fundamental integrity of this state's judicial system." *Smith v. Superior Court*, 49 Cal. Rptr. 2d at 27. Similarly, a federal district court in Arizona explained that the Michigan injunction "prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth." *Hannah v. General Motors Corp.*, No. Civ. 93-1368 PHX RCB, slip op. 5 (D. Ariz. May 30, 1996); *see also Kibler v. General Motors Corp.*, No. C94-1494R, slip op. 2 (W.D. Wash. July 10, 1996) (injunction interferes with "the search for truth at trial"); *Williams v. General Motors Corp.*, 147 F.R.D. 270, 273 (S.D. Ga. 1993) ("Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret information is outweighed by the public interest in full and fair discovery."); *Bishop v. General*

Motors Corp., No. 94-286-S, slip op. 2 (E.D. Okla. June 29, 1994) (injunction unenforceable because it infringes Oklahoma and federal interest in "full discovery").

3. The fundamental and overriding interests implicated here mean that the Michigan state-court injunction cannot bar the taking of relevant, unprivileged testimony in the Missouri federal court. To give the courts of a state the power affirmatively to interfere with the course of proceedings in the courts of another jurisdiction would in essence allow them to "commandeer" the official processes of another sovereign. *New York v. United States*, 505 U.S. 144, 161, 170, 173, 176 (1992) (Tenth Amendment context). This Court has never interpreted Art. IV, § 1 as a boundless inroad into the internal operations of the judicial branches of sister states or the federal government.[16] So construing the Full Faith and Credit obligation would run counter to the constitutional plan and "risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion).[17]

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[16] The framers rejected even the lesser step of deeming the rendering state's judgment a judgment of the enforcing state. *See Williams v. North Carolina*, 325 U.S. 226, 229 (1945) ("the [Full Faith and Credit] Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention.").

[17] Although the Restatement does not recognize a substantive public policy exception to the Full Faith and Credit obligation, *see* Restatement (Second) of Conflict of Laws § 117 (1971), it does recognize a limited exception for judgments "involv[ing] an improper interference with important interests of the sister State." *Id.* at § 103; *see* Hon. Ruth Bader Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 808 & n.45, 819 n.87 (1969); Willis M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 164, 171-77 (1949) (outlining exception

The Full Faith and Credit obligation simply does not warrant the affirmative interference with ongoing judicial proceedings that enforcing the Michigan injunction here would trigger. In fact, this Court has never held that an injunction — as opposed to a judgment for money damages — is entitled to Full Faith and Credit. *See* Restatement (Second) of Conflict of Laws § 102, comment c (1971) ("The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act. No definite statement on the point is therefore made in the rule of this Section."). The Restatement recognizes that the intrusive imposition on the judicial process entailed by injunctive relief is one justification for the reluctance to give it extraterritorial effect.[18]

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based on "forbidden infringement of the interests of a state"). *See also Estin v. Estin*, 334 U.S. 541, 546-47 (1948); *Morris v. Jones*, 329 U.S. 545, 551 (1947); *Williams*, 325 U.S. at 232, 239; *Esenwein v. Esenwein*, 325 U.S. 279, 282 (1945) (Douglas, J., concurring); *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273-74 (1935).

[18] Although the Restatement speculates that "[i]t may well be that the Supreme Court, when presented with the question, will hold that the enforcement of such decrees is required by full faith and credit," it goes on to say:

> [I]n support of the view that the enforcement of such a sister State decree lies in the discretion of the forum is the argument made in § 449 of the original Restatement of this Subject that the granting or denying of equitable relief, other than an order for the payment of money, is a matter of discretion and that "[t]he decision by one court to give specific relief . . . will not limit another court and thus exclude the use of the discretion of the second court." Also the enforcement of a judgment ordering or enjoining the doing of an act might on occasion require continuing

Thus, this Court has opined that an injunction can have "no extraterritorial operation" under the Full Faith and Credit Clause, and that its enforceability must depend on the "local statutes and practice" of the forum state. *Lynde v. Lynde*, 181 U.S. 183, 187 (1901). *See also Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 128-29 (1904) (enforcement of otherwise valid judgment may be defeated if courts of state where enforcement is sought are not equipped to fashion the remedy specified by the original decree); *cf. Tennessee Coal Iron & R.R. Co. v. George*, 233 U.S. 354, 360 (1914) ("jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action").

In particular, lower courts have traditionally held that injunctions *directed at the judicial process itself* are not entitled to Full Faith and Credit. It is hornbook law that "[n]either the full faith and credit clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction against the prosecution of a local action at law." 42 Am. Jur.2d *Injunctions* § 227.[19] The Restatement gives, as an

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supervision by the enforcing court or be otherwise onerous.

Restatement (Second) of Conflict of Laws § 102, comment c; *see also* Michael Collins, Comment, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. 295, 397 n. 474 (1984) ("The Supreme Court has not ruled whether full faith and credit require the enforcement of another state's equitable decrees. State courts have typically assumed it does not."); Comment, *Developments in the Law— Injunctions*, 78 Harv. L. Rev. 994, 1044 (1965) (distinguishing money judgments from injunctions for Full Faith and Credit purposes).

[19] *See also* Justice Ginsburg, 82 HARV. L. REV. at 823 ("state courts that have dealt with the question have consistently regarded such decrees as outside the full faith and credit ambit"); Annot., 74 A.L.R.2d 828, § 4 ("[I]t has been held that an antisuit injunction issued by a court of one state is not entitled to recognition in the courts of a sister state and does not preclude the maintenance of the action enjoined.").

example of its "improper interference with important interests" exception, the proposition that "full faith and credit does not require a State to recognize a sister State injunction against suit in its courts." Restatement (Second) of Conflict of Laws at § 103, comment b.

It follows *a fortiori* from these principles that the Michigan injunction here is not entitled to Full Faith and Credit. For that injunction affirmatively threatens the institutional integrity of ongoing judicial proceedings in federal and state courts outside Michigan. As one court reasoned in permitting Elwell to testify, "[p]ermanent injunctions entered in a sister state offer more potential for interference with the forum state's interests as a sovereign entity than do monetary judgments." *Bray v. General Motors Corp.*, No. 93-C-265, slip op. 5 (D. Colo. Jan. 20, 1995). *See also Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1996) ("neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction").

4. Under the principle of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), the absence of a Full Faith and Credit obligation is especially clear in the case at bar. For this case involves the power of a *state* court to prevent the admission of relevant and probative evidence in an ongoing *federal* judicial proceeding. Yet "the old and well-established judicially declared rule [is] that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here." *Id.* at 412-13. This rule is premised on the general maxim that "state and federal courts would not *interfere with* or try to restrain each other's proceedings." *Id.* at 412 (emphasis added). And it does not matter whether an injunction is "addressed to the parties rather than to the federal court itself." *Id.* at 413; *see also General Atomic Co. v. Felter*, 434 U.S. 12, 17-18 (1977) (*per curiam*).

Here, of course, the explicit effect given by the Eighth Circuit to the Michigan injunction is to bar petitioners from introducing

Elwell's testimony in a federal court in Missouri. If a state court's judgment is to be given the effect of enjoining federal court litigants in such a manner, then there is nothing to prevent a state court from barring parties in federal court from introducing specified documentary evidence; from prohibiting plaintiffs (or defendants) from asserting particular legal claims (or defenses); from insisting that witnesses in a federal proceeding testify in a specified manner; or otherwise from controlling federal court litigation.

In short, the Eighth Circuit's decision would eviscerate the rule of *Donovan v. Dallas*, the purpose of which is to avoid "the difficulties that are the necessary result of an attempt to exercise [judicial] power over a party who is a litigant in another and independent forum." 377 U.S. at 413 (internal quotation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed insofar as it held that the Full Faith and Credit obligation prevented Ronald Elwell from testifying in this case.

Respectfully submitted.

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ADDENDUM

COURT DECISIONS ALLOWING ELWELL TESTIMONY

APPELLATE COURT DECISIONS:

1. *Carpenter v. General Motors Corp.*, Case No. 93-CA-1788-OA, (Ky. Ct. App. Sept. 20, 1993) (setting aside lower court order granting defendant General Motors Corporation's motion to quash plaintiff's motion to take out-of-state deposition of Ronald Elwell and granting plaintiff's motion to take deposition of Elwell).

2. *General Motors Corp. v. The Honorable Benjamin Euresti, Jr., Judge*, Case No. 94-1092 (Tex. Nov. 12, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus); *Correa v. General Motors Corp.*, No. 93-04-1704-A (Dist. Ct. Cameron Co. Sept. 22, 1994) (order granting plaintiffs' motion to depose Ronald Elwell).

3. *General Motors Corp. v. The Honorable J. Ray Gayle, III, Judge*, Case No. 94-1163 (Tex. Nov. 15, 1994) (overruling relator General Motors Corporation's motion for leave to file Petition for Writ of Mandamus and Motion for Emergency Stay); *General Motors Corporation, Relator v. The Honorable J. Ray Gayle, III, Judge, Respondent*, Case No. B14-94-01082-CV (Tex. Civ. App. Nov. 10, 1994) (denying relator General Motors Corporation's petition for leave to file petition for writ of mandamus and emergency motion to stay deposition of Ronald Elwell); Delarosa v. General Motors Corporation, et al., Case No. 90G2176; *Meche v. General Motors Corp.*, Case No. 91G1378; *Robinson v. General Motors Corp.*, Case No. 93G2052; *Heidaker v. General Motors Corp.*, Case No. 93G1357; *Norton (Daniel) v. General Motors Corp.*, Case No.

93M2036 (Dist. Ct. Brazoria Co. July 12, 1994) (granting plaintiffs' collective motions for deposition of Ronald Elwell); "Order on Motion of Rehearing and Motions to Permit Videotape Deposition of Ronald E. Elwell" (Aug. 8, 1994) (granting plaintiffs motions to permit videotape deposition of Elwell).

4. *General Motors Corp. v. The Honorable Robert Garza, Judge*, Case No. 94-0494 (Tex. June 29, 1994) (granting relator General Motors Corporation's motion to withdraw motion for leave to file petition for writ of mandamus (pursuant to settlement)); *General Motors Corp. v. The Honorable Robert Garza, Judge*, Cause No. 13-94-168-CV (Tex. Civ. App. May 3, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus) (rendered May 3, 1994); *Huerta v. General Motors Corp.*, Cause No. 93-12-7022-B (Dist. Ct. Cameron Co. Mar. 7, 1994) (granting plaintiff's motion to consult with and take the deposition of Ronald Elwell).

5. *Meenach v. General Motors Corp.*, 891 S.W.2d 398 (Ky. 1995) (holding that the lower court may modify the Michigan injunction to allow plaintiffs access to non-protected facts in the possession of Elwell).

6. *Smith v. Superior Court (General Motors Corp., Real Party in Interest); Stephens v. Superior Court (General Motors Corp., Real Party in Interest)*, 49 Cal.Rptr.2d 20 (Cal. App. 5th Dist. 1996) (granting plaintiffs' motions to obtain the testimony of Ronald Elwell).

7. *Worden v. General Motors Corp.*, Case No. 18127-4-II (Wash. App. May 20, 1994) (upholding trial court's order granting plaintiffs' motion for video deposition and/or trial testimony of Ronald Elwell and denying defendant's motion for protective order to prevent Elwell's testimony); *Worden v.*

General Motors Corp., Case No. 92-2-11770-9 (Sup. Ct. of Pierce Co. Mar. 11, 1994) (denying General Motors Corporation's motion for protective order to prevent testimony of Ronald Elwell and granting plaintiffs' motion for videotaped deposition and/or trial testimony of Elwell).

TRIAL COURT ORDERS:

8. *Ake v. General Motors Corp.*, 942 F. Supp. 869 (W.D.N.Y. 1996) (denying defense motion to preclude Elwell from testifying).

9. *Anderson v. General Motors Corp.*, Case No. 342-160528-95 (Dist. Ct. Tarrant Co., Tex. Mar. 19, 1996) (granting plaintiffs' motion to obtain the testimony of Ronald Elwell and imposing conditional sanctions upon GM if it seeks and is denied mandamus relief).

10. *Bishop v. General Motors Corp.*, Case No. 94-286-S, (E.D. Okla. June 29, 1994) (denying General Motors' for protective order preventing the taking of Ronald Elwell's deposition).

11. *Bray v. General Motors Corp.*, Civil Action No. 93-C-2656 (D. Colo. Jan. 20, 1995) (granting plaintiff's motion to permit the deposition of Ronald Elwell).

12. *Colmenares v. General Motors Corp.*, Case No. BC004030 (Super. Ct. Los Angeles Co. Sept. 13, 1993) (denying General Motors Corporation's motion for protective order that deposition of Ronald Elwell not be taken) (entered September 13, 1993).

13. *Diaz v. General Motors Corp.*, Cause No. C-079-94-B, (Dist. Ct. Hidalgo Co. Aug. 31, 1994) (granting plaintiff's motion to take deposition of Ronald Elwell).

14. *Dixon v. General Motors Corp.*, Civil Action No. 2:94-CV-314PS (S. D. Miss. May 1, 1995) (granting plaintiffs' motion to call Ronald Elwell at trial and denying General Motors Corporation's motion for protective order).

15. *Downen v. General Motors Corp.*, Case No. CIV 144604 (Super. Ct. Ventura Co., Calif. May 5, 1995) (granting plaintiff's motion to take videotaped deposition of Ronald E. Elwell).

16. *Gonzales v. General Motors Corp.*, CV-93-87-M-CCL (D. Mont. Feb. 14, 1995) (granting plaintiff's motion to take deposition of Ronald Elwell).

17. *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. May 29, 1996) (granting plaintiffs' motion to vacate and/or modify the Order regarding Elwell's testimony and denying defendant's motion to strike Elwell from plaintiffs' witness list); *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. Feb. 4, 1996) (deferring ruling on defendant's motion to strike Elwell from plaintiff's witness list and preclude his testimony; allowing plaintiffs 90 days to petition the Michigan court for a modification of the permanent injunction).

18. *Hart v. General Motors Corp.*, C.A. No. 96-CV-1862-CC (N.D.Ga. Feb. 11, 1997) (granting plaintiff's motion to permit deposition of Elwell).

19. *Head v. General Motors Corp.*, CA No. 6:95-3613-20 (D.S.C. July 17, 1996) (granting plaintiff's motion to allow Elwell to testify).

20. *Kibler v. General Motors Corp.*, No. C94-1494R (W.D. Wash. July 10, 1996) (denying defendant's motion to prevent Elwell from testifying as expert witness).

21. *Koval v. General Motors Corp.*, Case No. 137016 (Ct. Common Pleas, Cuyahoga Co., Ohio Aug. 28, 1992) (ordering that deposition of Ronald Elwell may proceed as noticed).

22. *Martin v. General Motors Corp.*, Case No. 92CIV0724 (Ct. Common Pleas, Medina Co., Ohio Oct. 21, 1994) (ordering that the deposition of Ronald Elwell be taken).

23. *Norton v. General Motors Corp.*, Case No 3:93-CV-62(W) (S) (S.D. Miss. Nov. 20, 1993) (granting plaintiffs' motion to take Elwell's deposition).

24. *Peoples v. General Motors Corp.*, Case No. CV 91-490J (Cir. Ct., Limestone Co., Ala. June 8, 1993) (denying General Motors' motion to quash plaintiff's deposition subpoena to Elwell).

25. *Pollan v. General Motors Corp.*, Case No. 92-47545 (Dist. Ct., Harris Co., Tex. Dec. 27, 1993) (denying General Motors' motion for reconsideration of order permitting deposition of Ron Elwell).

26. *Renze v. General Motors Corp./O'Connor v. General Motors Corp.*, LAW No. L93-2080 (Cir. Ct. of City of Va. Beach, Va. Apr. 14, 1995) (granting plaintiffs' motion to consult with and take the video deposition of Ronald Elwell and denying General Motors Corporation's motion for protective order prohibiting plaintiffs from taking the deposition of or consulting with Ronald Elwell).

27. *Roberts v. General Motors Corp.*, Case No. E-12577 (Super. Ct. Fulton Co., Ga. Dec. 20, 1993) (granting plaintiff's motion for order permitting deposition of Ronald Elwell).

28. *Ruskin v. General Motors Corp.*, Case No. CV930073883, 1995 WL 41399 (Super. Ct., Litchfield, Conn.

Jan. 25, 1995) (granting plaintiff's motion to take deposition of Elwell).

29. *Shaffer-Kleoppel v. General Motors Corp.*, Case No. 93-0498-CV-W-8 (W.D. Mo.) (granting plaintiff's motion to depose Ronald Elwell and ordering that deposition shall not be limited to factual testimony but may include opinion testimony).

30. *Shoemaker v. General Motors Corp.*, Case No. 91-0990-CV-W-8; *Baker v. General Motors Corp.*, Case No. 91-0991-CV-W-8, (W.D. Mo. June 18, 1993) (granting plaintiffs' motion to take videotape deposition of Ronald Elwell and denying General Motors' motion for protective order).

31. *Thompson v. GMC Truck Center*, Case No. BC045258 (Super. Ct. Los Angeles Co., Calif. Apr. 7, 1994) (permitting Ronald Elwell to testify at trial over defendant's contrary motion).

32. *Vasquez v. General Motors Corp.*, Case No. 223079, (Super. Ct. Kern Co., Calif. May 6, 1994) (granting plaintiff's motion for an order permitting testimony by expert Ronald Elwell).

33. *Williams v. General Motors Corporation*, 147 F.R.D. 270 (S.D. Ga. 1993) (granting plaintiffs' motion to depose Ronald Elwell).